



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 24 1996

MEMORANDUM

SUBJECT: Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities

FROM: Steven A. Herman
Assistant Administrator
Office of Enforcement and Compliance Assurance

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Assistant Administrator
Office of Solid Waste and Emergency Response

TO: RCRA/CERCLA National Policy Managers
Regions I-X

Good RCRA/CERCLA coordination has become increasingly important as our offices have reorganized and programs have assumed new organizational relationships. We believe that, in general, coordination of site cleanup activities among EPA RCRA, EPA CERCLA and state/tribal cleanup programs has improved greatly; however, we are aware of examples of some remaining coordination difficulties. In this memo, we discuss three areas: acceptance of decisions made by other remedial programs; deferral of activities and coordination among EPA RCRA, EPA CERCLA and state/tribal cleanup programs; and coordination of the specific standards and administrative requirements for closure of RCRA regulated units with other cleanup activities. We also announce a revision to the Agency's policy on the use of fate and transport calculations to meet the "clean closure" performance standard under RCRA. We hope the guidance offered here will assist in your continuing efforts to eliminate duplication of effort, streamline cleanup processes, and build effective relationships with the states and tribes.

This memorandum focuses on coordination between CERCLA and RCRA cleanup programs; however, we believe the approaches outlined here are also applicable to coordination between either of these programs and certain state or tribal cleanup programs that meet appropriate criteria. For example, over half of the states have "Superfund-like"



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authorities. In some cases, these state authorities are substantially equivalent in scope and effect to the federal CERCLA program and to the state or federal RCRA corrective action program. In accordance with the 1984 Indian Policy, EPA recognizes tribes as sovereign nations, and will work with them on a government-to-government basis when coordinating cleanup efforts on lands under tribal jurisdiction.

In addition to the guidance provided in this memorandum, two other on-going initiatives address coordination of RCRA and CERCLA. First, EPA is currently coordinating an inter-agency and state "Lead Regulator Workgroup." This workgroup intends to provide guidance where overlapping cleanup authorities apply at federal facilities that identifies options for coordinating oversight and deferring cleanup from one program to another. We intend for today's memorandum and the pending guidance from the Lead Regulator Workgroup to work in concert to improve RCRA/CERCLA integration and coordination. Second, EPA has also requested comment on RCRA/CERCLA integration issues in the May 1, 1996 Advanced Notice of Proposed Rulemaking--Corrective Action for Releases From Solid Waste Management Units at Hazardous Waste Management Facilities (61 FR 19432; commonly referred to as the RCRA "Subpart S" ANPR). We intend to coordinate all of these efforts as we develop further policy on integration issues.

Acceptance of Decisions Made by Other Remedial Programs

Generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs.¹ We believe that, in most situations, EPA RCRA and CERCLA site managers can defer cleanup activities for all or part of a site from one program to another with the expectation that no further cleanup will be required under the deferring program. For example, when investigations or studies have been completed under one program, there should be no need to review or repeat those investigations or studies under another program. Similarly, a remedy that is acceptable under one program should be presumed to meet the standards of the other.

It has been our experience that, given the level of site-specific decision-making required for cleaning up sites, differences among the implementation approaches of the various remedial programs primarily reflect differences in professional judgement rather than structural inconsistencies in the programs themselves. Where there are differences in approaches among remedial programs, but not in their fundamental purposes or objectives (e.g., differences in analytical QA/QC procedures), these differences should not necessarily

¹ In a few, limited cases, program differences may be sufficiently great to prevent deferral to the other program (e.g., the inability of CERCLA to address petroleum releases or RCRA to address certain radioactive materials). In these instances we encourage remedial programs to coordinate closely with each other to minimize duplication of effort, including oversight.

prevent deferral. We encourage program implementors to focus on whether the end results of the remedial activities are substantively similar when making deferral decisions and to make every effort to resolve differences in professional judgement to avoid imposing two regulatory programs.

We are committed to the principle of parity between the RCRA corrective action and CERCLA programs and to the idea that the programs should yield similar remedies in similar circumstances. To further this goal, we have developed and continue to develop a number of joint (RCRA/CERCLA) guidance documents. For example, the several "Presumptive Remedies," which are preferred technologies for common categories of sites, and the Guidance for Evaluating the Technical Impracticability of Ground-Water Restoration (OSWER Directive 9234.2-25, September 1993), which recognizes the impracticability of achieving groundwater restoration at certain sites; are applicable to both RCRA and CERCLA cleanups. For more information on the concept of parity between the RCRA and CERCLA programs see: 54 FR 41000, esp. 41006-41009 (October 4, 1989), RCRA deferral policy; 54 FR 10520 (March 13, 1989), National Priorities List for Uncontrolled Hazardous Waste Sites Listing Policy for Federal Facilities; 55 FR, 30798, esp. 30852-30853 (July 27, 1990), Proposed Rule for Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities; 60 FR 14641 (March 20, 1995), Deletion Policy for RCRA Facilities; and, 61 FR 19432 (May 1, 1996), Corrective Action for Releases From Solid Waste Management Units at Hazardous Waste Management Facilities, Advanced Notice of Proposed Rulemaking.

Program Deferral

The concept of deferral from one program to another is already in general use at EPA. For example, it has long been EPA's policy to defer facilities that may be eligible for inclusion on the National Priorities List (NPL) to the RCRA program if they are subject to RCRA corrective action (unless they fall within certain exceptions, such as federal facilities). Recently, EPA expanded on this policy by issuing criteria for deleting sites that are on the NPL and deferring their cleanup to RCRA corrective action (attached).² When a site is deleted from the NPL and deferred to RCRA, problems of jurisdictional overlap and duplication of effort are eliminated, because the site will be handled solely under RCRA authority. Corrective action permits or orders should address all releases at a CERCLA site being deferred to RCRA; some RCRA permits or orders may need to be modified to address all releases before a site is deleted from the NPL.

² Currently, the RCRA deletion policy does not pertain to federal facilities, even if such facilities are also subject to Subtitle C of RCRA. Site Managers are encouraged to use interagency agreements to eliminate duplication of effort at federal facilities; the Lead Regulator Workgroup intends to provide additional guidance on coordinating oversight and deferring cleanup from one program to another at federal facilities.

While EPA's general policy is for facilities subject to both CERCLA and RCRA to be cleaned up under RCRA, in some cases, it may be more appropriate for the federal CERCLA program or a state/tribal "Superfund-like" cleanup program to take the lead. In these cases, the RCRA permit/order should defer corrective action at all of the facility to CERCLA or a state/tribal cleanup program. For example, where program priorities differ, and a cleanup under CERCLA has already been completed or is underway at a RCRA facility, corrective action conditions in the RCRA permit/order could state that the existence of a CERCLA action makes separate RCRA action unnecessary. In this case, there would be no need for the RCRA program to revisit the remedy at some later point in time. Where the CERCLA program has already selected a remedy, the RCRA permit could cite the CERCLA decision document (e.g., ROD), but would not necessarily have to incorporate that document by reference. RCRA permits/orders can also defer corrective action in a similar way for cleanups undertaken under state/tribal programs provided the state/tribal action protects human health and the environment to a degree at least equivalent to that required under the RCRA program.

Superfund policy on deferral of CERCLA sites for listing on the NPL while states and tribes oversee response actions is detailed in the May 3, 1995 OSWER Directive 9375.6-11 ("Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions"). The intent of this policy is to accelerate the rate of response actions by encouraging a greater state or tribal role, while maintaining protective cleanups and ensuring full public participation in the decision-making process. Once a deferral response is complete, EPA will remove the site from CERCLIS and will not consider the site for the NPL unless the Agency receives new information of a release or potential release that poses a significant threat to human health or the environment. The state and tribal deferral policy is available for sites not listed on the NPL; deferral of final NPL sites must be addressed under the Agency's deletion policy, as described above.

Coordination Between Programs

While deferral from one program to another is typically the most efficient and desirable way to address overlapping cleanup requirements, in some cases, full deferral will not be appropriate and coordination between programs will be required. The goal of any approach to coordination of remedial requirements should be to avoid duplication of effort (including oversight) and second-guessing of remedial decisions. We encourage you to be creative and focus on the most efficient path to the desired environmental result as you craft strategies for coordination of cleanup requirements under RCRA and CERCLA and between federal and state/tribal cleanup programs.

Several approaches for coordination between programs at facilities subject to both RCRA and CERCLA are currently in use. It is important to note that options for coordination at federal facilities subject to CERCLA §120 may differ from those at non-federal facilities

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requirements under §120. EPA anticipates issuing further specific to federal facilities through the interagency Lead approaches that are in use include:

decision documents so that cleanup responsibilities are RCRA decision documents do not have to require that the p under one or the other program. For example, at some under CERCLA, the RCRA units (regulated or solid waste) could be addressed under RCRA. In these cases, the ents can focus CERCLA activities on certain units or areas, ction under RCRA. When units or areas are deferred from CERCLA program should include a statement (e.g., in a ROD d to the administrative record) that successful completion of ninate the need for further cleanup under CERCLA at those would be necessary to delete the site from the NPL. areas are deferred from RCRA to CERCLA, RCRA permits ne CERCLA cleanup process and state that complying with the requirements would satisfy the requirements of RCRA.

es in RCRA and CERCLA decision documents. RCRA and ments can establish schedules according to which the o at all or part of a facility under one authority would be ompletion of an action under the other authority. For example, an establish schedules of compliance which allow decisions as ction is required to be made after completion of a CERCLA der a state/tribal authority. After the state or CERCLA there should be no need for further cleanup under RCRA and could simply make that finding. Similarly, CERCLA or gram decision documents could delay review of units or areas d under RCRA, with the expectation that no additional cleanup ken pending successful completion of the RCRA activities, ld have to go through the administrative step of deleting the site

approach is that it contemplates subsequent review of cleanup by and creates uncertainty by raising the possibility that a second e necessary. Therefore, we recommend that program to approaches that divide responsibilities, as described above. wever, may be most appropriate in certain circumstances, for fferent regulatory agencies are involved. Whenever a timing nal review by the deferring program will generally be very

cleanup of releases from closed ses under RCRA corrective in the final Post-Closure and

e for RCRA closure and other program implementors can nenting RCRA closure ons. These approaches are n cleanup programs. For cally encompasses a RCRA liance with CERCLA and the e RCRA permit/order could requirements by reference. the permit/order to be process to meet this need

d for removal and vide remediation under clean closure levels have anup levels have been at l to better coordinate isk-based levels when resented its position on the (52 FR 8704-8709, March e to be based on health-el exists, then background data on toxicity to allow

notice, that risk-based inations. In EPA's view, a was clean-closed under ion, or certain state/tribal This performance standard not achieve the closure RA capping and post-

t the use of fate and clean closure. ent that, after additional stringent approach is

streamlined. In conducting this review, there should be a strong presumption that the cleanup under the other program is adequate and that reconsidering the remedy should rarely be necessary.

The examples included in this memo demonstrate several possible approaches to deferring action from one cleanup program to another. For example, under RCRA, situations are described where the RCRA corrective action program would make a finding that no action is required under RCRA because the hazard is already being addressed under the CERCLA program, which EPA believes affords equivalent protection. In other examples, the RCRA program defers not to the CERCLA program *per se*, but either defers to a particular CERCLA ROD or actually incorporates such ROD by reference into a RCRA permit or order. In addition, there are examples where the Agency commits to revisit a deferral decision once the activity to which RCRA action is being deferred is completed; in other situations, reevaluation is not contemplated. As discussed in this memorandum, no single approach is recommended, because the decision of whether to defer action under one program to another and how to structure such a deferral is highly dependant on site-specific and community circumstances. In addition, the type of deferral chosen may raise issues concerning, for example, the type of supporting documentation that should be included in the administrative record for the decision, as well as issues concerning availability and scope of administrative and judicial review.

Agreements on coordination of cleanup programs should be fashioned to prevent revisiting of decisions and should be clearly incorporated and cross-referenced into existing or new agreements, permits or orders. We recognize that this up-front coordination requires significant resources. Our expectation is that, over the long-term, duplicative Agency oversight will be reduced and cleanup efficiency will be enhanced.

RCRA Closure and Post-Closure

Some of the most significant RCRA/CERCLA integration issues are associated with coordination of requirements for closure of RCRA regulated units³ with other cleanup activities. Currently, there are regulatory distinctions between requirements for closure of RCRA regulated units and other cleanup requirements (e.g., RCRA corrective action requirements). RCRA regulated units are subject to specific standards for operation, characterization of releases, ground water corrective action and closure. Coordination of these standards with other remedial activities can be challenging. In the November 8, 1994 proposed Post-Closure Rule (59 FR 55778), EPA requested comment on an approach that

³ In this document, the term "regulated unit" refers to any surface impoundment, waste pile, land treatment unit or landfill that receives (or has received) hazardous waste after July 26, 1982 or that certified closure after January 26, 1983.

would reduce or eliminate the regulatory distinction between cleanup of releases from closed or closing regulated units and cleanup of non-regulated unit releases under RCRA corrective action. The Office of Solid Waste will address this issue further in the final Post-Closure and Subpart S rules.

At the present time, however, the dual regulatory structure for RCRA closure and other cleanup activities remains in place. There are several approaches program implementors can use to reduce inconsistency and duplication of effort when implementing RCRA closure requirements during CERCLA cleanups or RCRA corrective actions. These approaches are analogous to the options discussed above for coordination between cleanup programs. For example, a clean-up plan for a CERCLA operable unit that physically encompasses a RCRA regulated unit could be structured to provide for concurrent compliance with CERCLA and the RCRA closure and post-closure requirements. In this example, the RCRA permit/order could cite the ongoing CERCLA cleanup, and incorporate the CERCLA requirements by reference. RCRA public participation requirements would have to be met for the permit/order to be issued; however, at many sites it may be possible to use a single process to meet this need under RCRA and CERCLA.

At some sites, inconsistent cleanup levels have been applied for removal and decontamination ("clean closure") of regulated units and for site-wide remediation under CERCLA or RCRA corrective action. Where this has happened, clean closure levels have been generally set at background levels while, at the same site, cleanup levels have been at higher, risk-based concentrations. To avoid this inconsistency and to better coordinate between different regulatory programs, we encourage you to use risk-based levels when developing clean-closure standards. The Agency has previously presented its position on the use of background and risk-based levels as clean closure standards (52 FR 8704-8709, March 19, 1987; attached). This notice states that clean closure levels are to be based on health-based levels approved by the Agency. If no Agency-approved level exists, then background concentrations may be used or a site owner may submit sufficient data on toxicity to allow EPA to determine what the health-based level should be.

EPA continues to believe, as stated in the March 19, 1987 notice, that risk-based approaches are protective and appropriate for clean-closure determinations. In EPA's view, a regulatory agency could reasonably conclude that a regulated unit was clean-closed under RCRA if it was cleaned up under Superfund, RCRA corrective action, or certain state/tribal cleanup programs to the performance standard for clean closure. This performance standard can be met with the use of risk-based levels. RCRA units that did not achieve the closure performance standard under a cleanup would remain subject to RCRA capping and post-closure care requirements.

The 1987 federal register notice described EPA's policy that the use of fate and transport models to establish risk levels would be inappropriate for clean closure determinations. This discussion, however, also included the statement that, after additional experience with clean closures, "the Agency may decide that a less stringent approach is

sufficiently reliable to assure that closures based on such analyses are fully protective of human health and the environment." After nine years of further experience, EPA believes that, consistent with the use of risk-based standards in its remedial programs, use of fate and transport models to establish risk levels can be appropriate to establish clean closure determinations. EPA today announces that it is changing its 1987 policy on evaluating clean closure under RCRA to allow use of fate and transport models to support clean closure demonstrations. EPA intends to publish this change in the Federal Register in the near future.

We encourage you to consider risk-based approaches when developing cleanup levels for RCRA regulated units and to give consideration to levels set by state/tribal programs which use risk-based approaches. EPA is developing guidance on risk-based clean closure and on the use of models to meet the clean closure performance standard.

Since almost all states oversee the closure/post-closure process and more than half implement RCRA corrective action, coordination of RCRA corrective action and closure will often be solely a state issue. However, if a state is not authorized for corrective action, or if a facility is subject to CERCLA as well as RCRA corrective action, close coordination between federal and state agencies will be necessary. As discussed above, actual approaches to coordination or deferral at any site should be developed in consideration of site-specific and community concerns.

Summary

We encourage you to continue your efforts to coordinate activities between the RCRA and CERCLA programs and between state, tribal and federal cleanup programs. We are aware that several of the EPA Regions are considering developing formal mechanisms to ensure that coordination will occur among these programs. We endorse these efforts and encourage all Regions, states and tribes to consider the adoption of mechanisms or policies to ensure coordination. If you have any questions on the issues discussed in this memorandum, or on other RCRA/CERCLA issues, please call Hugh Davis at (703) 308-8633.

attachments

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John Thomasian, National Governors Association
Brian Zwi, National Association of State Attorneys General

Brian Zwi, National Association of Attorneys General

anti-abuse rule of paragraph (c)(1)(vi) of this section.

Example 4. Hedges counted only once. January 1, 1996, Corporation X owns a \$100 million portfolio of stocks all of which would substantially overlap with a \$100 million regulated futures contract (RFC) on a commonly used index (the Index). On January 15, Corporation X enters into a \$100 million short position in an RFC on the Index with a March delivery date and enters into a \$75 million long position in an RFC on the Index for June delivery. Also on January 15, 1996, Corporation X indicates in its books and records that the long and short RFC positions are intended to offset one another. Under paragraph (c)(5) of this section, \$75 million of the short position in the RFC is not treated as diminishing the risk of loss on the stock portfolio and instead is treated as a straddle or a hedging transaction, as appropriate, with respect to the \$75 million long position in the RFC, under section 1092. The remaining \$25 million short position is treated as diminishing the risk of loss on the portfolio by holding a position in substantially similar or related property. The rules of paragraph (c)(1) determine how much of the portfolio is subject to this rule and the rules of paragraph (c)(3) determine which shares have their holding periods tolled.

(e) **Effective date—(1) In general.** The provisions of this section apply to dividends received on or after March 17, 1995, on stock acquired after July 18, 1984.

(2) **Special rule for dividends received on certain stock.** Notwithstanding paragraph (e)(1) of this section, this section applies to any dividends received by a taxpayer on stock acquired after July 18, 1984, if the taxpayer has diminished its risk of loss by holding substantially similar or related property involving the following types of transactions—

(i) The short sale of common stock when holding convertible preferred stock of the same issuer and the price changes of the two stocks are related, or the short sale of a convertible debenture while holding convertible preferred stock into which the debenture is convertible (or common stock), or a short sale of convertible preferred stock while holding common stock; or

(ii) The acquisition of a short position in a regulated futures contract on a stock index, or the acquisition of an option to sell the regulated futures contract or the stock index itself, or the grant of a deep-in-the-money option to buy the regulated futures contract or the stock index while holding the stock of an

investment company whose principal holdings mimic the performance of the stocks included in the stock index; or alternatively, while holding a portfolio composed of stocks that mimic the performance of the stocks included in the stock index.

Par. 3. Section 1.1092(d)-2 is added to read as follows:

§ 1.1092(d)-2 Personal property.

(a) **Special rules for stock.** Under section 1092(d)(3)(B), personal property includes any stock that is part of a straddle, at least one of the offsetting positions of which is a position with respect to substantially similar or related property (other than stock). For purposes of this rule, the term *substantially similar or related property* is defined in § 1.246-5 (other than § 1.246-5(b)(3)). The rule in § 1.246-5(c)(6) does not narrow the related party rule in section 1092(d)(4).

(b) **Effective date—(1) In general.** This section applies to positions established on or after March 17, 1995.

(2) **Special rule for certain straddles.** This section applies to positions established after March 1, 1984, if the taxpayer substantially diminished its risk of loss by holding substantially similar or related property involving the following types of transactions—

(i) Holding offsetting positions consisting of stock and a convertible debenture of the same corporation where the price movements of the two positions are related; or

(ii) Holding a short position in a stock index regulated futures contract (or alternatively an option on such a regulated futures contract or an option on the stock index) and stock in an investment company whose principal holdings mimic the performance of the stocks included in the stock index (or alternatively a portfolio of stocks whose performance mimics the performance of the stocks included in the stock index).

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Dated: March 3, 1995.

Approved: Leslie Samuels, Assistant Secretary of the Treasury (Tax Policy).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-5173-4]

The National Priorities List for Uncontrolled Hazardous Waste Sites; Deletion Policy for Resource Conservation and Recovery Act Facilities

AGENCY: Environmental Protection Agency.

ACTION: Notice of policy statement.

SUMMARY: The Environmental Protection Agency ("EPA") is announcing a policy relating to the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2023, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list.

This document describes a policy for deleting sites from the NPL and deferring them to the Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA") corrective action program, if they meet the eligibility criteria for deletion set out in the NCP. EPA requested public comment on this policy on December 21, 1988 (53 FR 51421). The policy applies to sites on the NPL that are RCRA-regulated facilities engaged in treatment, storage or disposal of hazardous waste ("TSDs" under the RCRA program).

EFFECTIVE DATE: This policy is effective on April 19, 1995.

ADDRESSES: Comments received and the Agency's responses to them are contained in the Headquarters Superfund Docket. The Headquarters Superfund Docket is located at the U.S. Environmental Protection Agency, Crystal Gateway #1, 12th Floor, 1235 Jefferson Davis Highway, Arlington, VA. It is available for viewing by appointment only from 9:00 a.m. to 4:00

p.m., Monday through Friday, excluding Federal holidays, Telephone 703/603-8917.

FOR FURTHER INFORMATION CONTACT: The Superfund Hotline, phone 800/424-9346 (or 703/412-9810 in the Washington, DC metropolitan area).

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Purpose of CERCLA

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, *et seq.* ("CERCLA" or "the Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L., No. 99-499, 100 Stat. 1613. To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised most recently by EPA on March 8, 1990 (55 FR 8664), sets forth guidelines and procedures for responding under CERCLA to releases and threatened releases of hazardous substances, pollutants, or contaminants.

The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list.

EPA requested public comment on this policy on December 21, 1988 (53 FR 51421).

B. Purpose of the NPL

Section 105(a)(8)(A) of CERCLA requires that the NCP include criteria for "determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action." Section 105(a)(8)(B) of CERCLA requires that those criteria be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National

Priorities List ("NPL"). A site may undergo Fund-financed remedial action only after it is placed on the NPL. See 40 CFR 300.425(b)(1).

The Hazard Ranking System ("HRS"), which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982), and amended (55 FR 51532, December 14, 1990), is the principal tool upon which the Agency relies to determine the priority sites for possible remedial actions under CERCLA. 40 CFR 300.425(c)(1). In addition to the HRS scoring method, a site also may be listed if designated as a state's highest priority, or if the Agency for Toxic Substances and Disease Registry ("ATSDR") has issued a health advisory for the site, and EPA determines that the site poses a significant threat to public health and that it will be more cost effective to use the Agency's remedial authority than to use removal authority to respond to a release. *Id.* at 40 CFR 300.425(c)(2) and (3).

II. Policy for Deleting Sites from the NPL Based Upon RCRA Deferral

A. Purpose of Today's Notice

This notice announces the Agency's policy of deleting RCRA facilities from the NPL before a cleanup is complete, if the site is being, or will be, adequately addressed by the RCRA corrective action program under an existing permit or order. EPA must also be satisfied, based either on an evaluation of a petition from a person outside the Agency or via a unilateral Agency determination, that the site, as defined by the CERCLA program, falls within the criteria for deferral.

The terms "deferral" and "deletion" as used in the context of the NPL refer to the following: Deferral refers to the decision not to list a site on the NPL, or not retain a site on the NPL, to allow another authority (RCRA corrective action in this case) to handle the remediation of the site in lieu of CERCLA. Deletion is the act of taking a site off the NPL, which may occur because cleanup at a site is complete or because another authority (such as RCRA corrective action) can be used to bring about remediation at the site and further CERCLA action is not needed. Please see Appendix A for a summary of the development of deferral policies.

B. Rationale for Deleting Sites Based Upon RCRA Deferral Under NCP Deletion Criteria

EPA believes it is appropriate to delete sites from the NPL based upon deferral to RCRA under certain circumstances. Deletion of sites from the NPL to defer them to RCRA Subtitle C

corrective action authorities would free CERCLA's oversight resources for use in situations where another authority is not available, as well as avoid possible duplication of effort and the need for an owner/operator to follow more than one set of regulatory procedures.

Eliminating regulation under two separate authorities also will eliminate public and owner/operator confusion over which authority has primacy. Moreover, since the CERCLA and RCRA programs have comparable cleanup goals, RCRA Subtitle C facilities requiring remediation appropriately may be deferred to RCRA corrective action authorities unless deletion would interfere with the remediation of the site.

However, today's RCRA deletion policy does not pertain to Federal facility sites. Federal facility sites will not be deleted from the NPL based upon deferral to RCRA, even if such facilities are also subject to the corrective action authorities of Subtitle C of RCRA. One of the primary goals of deferral—maximizing the use of limited Fund monies—does not apply to Federal facility sites since Federal facilities typically are not eligible for Fund-financed remedial action. Furthermore, the goal of avoiding duplication of efforts can be resolved through the use of comprehensive Inter-Agency Agreements (54 FR 10522, March 13, 1989).

C. Proposed Criteria for Deleting Sites from the NPL Based on Deferral to RCRA

The following are the criteria proposed in the December 21, 1988 Federal Register notice for determining whether a site may be deleted from the NPL based upon deferral to another authority such as RCRA:

- i. A site on the NPL is currently being addressed by another regulatory authority under an enforceable order or permit requiring corrective action or the PRPs have entered into a CERCLA consent order to perform the RD/RA;
- ii. Response is progressing adequately;
- iii. Deletion would not otherwise disrupt an ongoing CERCLA response action; and
- iv. All criteria for deferral to that authority have been met (i.e., the requesting party must meet all conditions for deferral to that authority in addition to the three specific criteria set out above for deletion based upon deferral).

D. Final Criteria for Deleting Sites

EPA believes that it is appropriate to apply different and more stringent

criteria to actions to delete based on deferral to RCRA for sites that are on the NPL than to sites that are candidates for deferral prior to NPL listing. For NPL sites, EPA has completed its listing process, identified the site as a potential problem requiring further attention, and often has commenced CERCLA response actions. In addition, the listing itself has created public anticipation of a response under CERCLA. Thus, EPA and the public will generally have an interest in seeing that these sites are addressed by the Superfund program, particularly in cases where significant Superfund resources already have been expended at a site. Thus, it is in the best interest of the public to apply different and more stringent criteria.

In today's notice, EPA is finalizing the criteria enumerated below for use in identifying sites eligible for deletion based upon deferral to RCRA corrective action authorities. A site should satisfy all of these criteria to be eligible for deletion. Where there is uncertainty as to whether the criteria have been met, deletion generally will be inappropriate. The criteria are the following:

1. If evaluated under EPA's current RCRA/NPL deferral policy,¹ the site would be eligible for deferral from listing on the NPL.
2. The CERCLA site is currently being addressed by RCRA corrective action authorities under an existing enforceable order or permit containing corrective action provisions.
3. Response under RCRA is progressing adequately.
4. Deletion would not disrupt an ongoing CERCLA response action.

E. Discussion of Each Criterion

The first criterion states that sites generally will not be eligible for deletion from the NPL based upon deferral to RCRA corrective action if similarly situated sites would not be deferred from listing on the NPL.

Two types of sites may be eligible for deletion: 1) sites that would be eligible for deferral under current deferral criteria, but were not deferred because the deferral policy at the time of listing was different; and 2) sites that were not eligible for deferral when listed, but now may be eligible because of changed conditions at the site (e.g., they no longer are in bankruptcy, or they now are in compliance with a corrective

action order). For RCRA facilities within the second category, the Agency will review the original listing rationale (e.g., unwillingness, bankruptcy) together with current information to ascertain whether conditions at the site have changed sufficiently to warrant deletion from the NPL. Where there is uncertainty about whether the criteria have been met, deletion generally will be inappropriate. Persons who submit petitions for deletion will have to bear the burden of demonstrating that they meet the current criteria for deletion based upon deferral, and that the conditions that justified the listing no longer exist and are not likely to recur.

The second criterion states that the site is being addressed by RCRA corrective action authorities under an existing order or permit. The criterion specifies that the requirement applies to sites as defined by CERCLA, and that the authority addressing the site is RCRA Subtitle C corrective action.

Under the second criterion, corrective action orders or permits issued by EPA or an authorized state program that address corrective action at the facility must generally be in place as a condition of deletion. This criterion serves as an objective indicator that contamination at a site is addressable under RCRA corrective action authorities. The term "addressable" in this context means that a CERCLA site is fully remediable by a permit or order with a schedule of compliance, whether or not actual cleanup has begun.

Corrective action permits or orders should require the cleanup of all releases at the CERCLA site (e.g., if contamination stemming from the CERCLA "release" extends beyond the boundaries of a particular RCRA facility, such releases must be addressed under RCRA sections 3004(v) and 3008(h) or other enforcement authority under RCRA);² otherwise, the CERCLA site would not be a candidate for deletion. There may be circumstances where modification of corrective action orders or permits may be necessary before a facility can be considered for deletion from the NPL. For example, a facility owner/operator who has been doing

remedial work under CERCLA and intends to pursue deletion from the NPL, generally must obtain modification of RCRA permits or orders if existing permits and orders do not contain corrective action requirements for all operable units. Likewise, the implementing agency intending to unilaterally pursue deletion would need to modify orders or permits if necessary. This should enable the facility to meet the second criterion by ensuring that the entire CERCLA-defined facility is subject to RCRA corrective action.

Under the third criterion, EPA evaluates whether response under RCRA is progressing adequately. The RCRA/NPL deferral policy currently looks to compliance with corrective action orders or permits as the primary indicator of whether an owner/operator is willing to undertake corrective action. Under this criterion, noncompliance with corrective action orders and permits generally would be regarded as an indicator that response under RCRA is not progressing adequately. The Agency's evaluation may not end there, however. Even if an owner/operator is in compliance with a corrective action order or permit, EPA may determine that response is not progressing adequately based upon other factors. For example, the Agency may consider whether there has been a history of protracted negotiations due primarily to an uncooperative owner or operator.

Under the fourth criterion, EPA evaluates on a site-by-site basis whether deletion would disrupt an ongoing CERCLA response action. Consistent with the deletion criterion set forth in the NCP, the fourth criterion in today's notice is satisfied only where one of the following two circumstances exist: 1) no CERCLA response has been undertaken; or 2) CERCLA response has been discontinued (e.g., where CERCLA response action has reached a logical point of transfer to the RCRA program and has been discontinued). Response actions being undertaken under CERCLA generally will not be discontinued solely to allow for deletion.

In cases where EPA determines that a CERCLA response, or a CERCLA response combined with a RCRA response, is the most effective approach for addressing contamination at a site, the site will be retained on the NPL. In addition, a site generally will not be eligible for deletion based upon deferral to RCRA if such deletion would cause a significant delay in the response resulting in a threat to human health or the environment.

¹ The term "current RCRA/NPL deferral policy" refers to the policy in effect at the time the deletion decision is made. As past Federal Register notices demonstrate, the RCRA/NPL deferral policy has changed, and may continue to change based upon the Agency's continued evaluation of how best to implement the statutory authorities of RCRA and CERCLA.

² Under CERCLA, the term "facility" is meant to be synonymous with "site" or "release" and is not meant to suggest that the listing is geographically defined (56 FR 5600, February 11, 1991). The size or extent of a facility listed on the NPL may extend to those areas where the contamination has "come to be located." (See CERCLA section 101(9)). On the other hand, a "facility" as defined under RCRA is "all contiguous property under the control of the owner or operator seeking a Subtitle C permit" (56 FR 8664, February 16, 1993). Thus, a RCRA site relates more to property boundaries, and a CERCLA site/facility/release includes contamination irrespective of RCRA facility boundaries.

F. Process for Deleting Sites From the NPL

In order for a site to be deleted from the NPL based upon deferral to RCRA, that site will be evaluated by EPA, as well as the relevant state authority. Deferral will be accomplished only after a coordinated review has occurred and concurrence has been achieved. As with any deletion, a decision to delete a site based upon deferral to RCRA would be made only after EPA publishes a Notice of Intent to Delete in the Federal Register and comment is taken. In addition, EPA's regulations allow a site to be deleted only if "the state in which the release was located has concurred on the proposed deletion" (40 CFR 300.425(e)(2)).

The process of deletion may begin either by a petition by a party outside the Agency, such as a facility owner/operator, or via a unilateral action from EPA. Petitions and inquiries about them should be directed to the appropriate Regional Administrator. The petitioner must demonstrate that the site has met the four criteria to the satisfaction of EPA, as well as the state in which the release has occurred. If necessary, the Agency may request additional information from the petitioner before making a decision.

Finally, if, after deletion, EPA later determines that a site is not being addressed adequately under RCRA, and that CERCLA remedial action is necessary at the site, the site would remain eligible for CERCLA Fund-financed remedial action. (40 CFR 300.425(e)(3)). Under such circumstances, and in accordance with the NCP, the site also may be eligible for relisting on the NPL.

III. Appendix A: Summary of NPL Deletion/Deferral Policies

1. NCP Criteria for Deleting Sites From the NPL

Section 300.425(e)(1)(i)-(iii) of the NCP addresses deletion of sites from the NPL. Pursuant to that section, releases may be deleted from the NPL where EPA determines that no further response is appropriate. In making that determination, EPA must consider, in consultation with the state, whether any of the following criteria have been met:

- (i) Responsible parties or other persons have implemented all appropriate response actions required;
- (ii) All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or
- (iii) The remedial investigation has shown that the release poses no

significant threat to public health or the environment and therefore, taking remedial measures is not appropriate.

2. Current Deferral Policies

When the initial NPL was promulgated (48 FR 40658, September 8, 1983), the Agency announced certain listing policies relating to sites that might qualify for the NPL, but instead could be "deferred" to another authority for cleanup. These deferral policies included sites that can be addressed by the corrective action authorities of RCRA Subtitle C, or that are subject to regulation by the Nuclear Regulatory Commission.³ (*Id.* at 40661-62).

3. RCRA Deferral Policy

In the preamble to the final rule promulgating the initial NPL (48 FR 40662, September 8, 1983), EPA announced the RCRA/NPL deferral policy, which provided that "where a site consists of regulated units of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL but will instead be addressed under the authorities of RCRA." Since that time, EPA has amended the RCRA/NPL deferral policy on a number of occasions. (For a more detailed discussion of the components of the RCRA/NPL deferral policy, see the Federal Register notice referenced below.)

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA) only releases to ground water from regulated units, i.e. surface impoundments, waste piles, land treatment areas, and landfills were subject to corrective action requirements under RCRA. The enactment of HSWA greatly expanded RCRA Subtitle C corrective action authorities. For example, under RCRA section 3004(u), hazardous waste treatment, storage, and disposal facilities seeking RCRA permits must address all releases of hazardous constituents to any medium from solid waste management units, whether active or inactive. HSWA also provided new

authority in RCRA section 3004(v) to address releases that have migrated beyond the facility boundary. In addition, section 3008(b) authorizes EPA to compel corrective action or any response necessary to protect human health or the environment when there is or has been a release of hazardous waste at a RCRA interim status facility.

In light of the new authorities, the Agency proposed in the preamble to the April 10, 1985 proposed rule (50 FR 14118), a revised policy for listing of RCRA-related sites on the NPL. Under the proposed policy, listing on the NPL of RCRA-related sites would be deferred until the Agency determined that RCRA corrective action measures were not likely to succeed due to factors outlined in the following paragraph.

On June 10, 1986 (51 FR 21057), EPA announced several new components of the RCRA/NPL deferral policy for placing RCRA-regulated facilities on the NPL. Certain RCRA facilities at which Subtitle C corrective action authorities are available would generally be listed if they had an HRS score of 28.50 or greater and fell within at least one of the following categories: (1) Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws; (2) facilities that have lost authorization to operate, or for which there are additional indications that the owner or operator will be unwilling to undertake corrective action; or (3) facilities, analyzed on a case-by-case basis, whose owners or operators have a clear history of unwillingness to undertake corrective action.

The Agency also recognized that facilities clearly not subject to RCRA Subtitle C corrective action authorities would be eligible for listing on the NPL, including those that ceased treating, storing or disposing of hazardous wastes prior to November 19, 1980 (the effective date of the RCRA hazardous waste regulations), and sites at which only material exempted from the statutory or regulatory definition of solid waste or hazardous waste are managed. *Id.* In addition, RCRA hazardous waste handlers to which Subtitle C corrective action authorities do not apply, such as hazardous waste generators or transporters not required to have interim status or a final RCRA permit, also are eligible for listing. *Id.*

On June 24, 1988 (53 FR 23980) and October 4, 1989 (54 FR 41004), EPA revised the NPL/RCRA deferral policy by identifying four new categories of RCRA sites eligible for listing on the NPL: (1) Non- or late filers; (2) pre-HSWA permittees; (3) protective filers;

³ In 1988, the Agency proposed to defer to a number of other authorities, namely Subtitles D and I of RCRA, the Surface Mine Control and Reclamation Act ("SMCRA"), the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and States, and to allow responsible parties voluntarily to clean up sites under CERCLA without listing (53 FR 51415, December 21, 1988). Final decisions have not been made on those proposals, and they are not addressed in this notice.

* On March 13, 1989 (54 FR 10520), EPA announced the policy of including on the NPL Federal facility sites that may be eligible for listing (e.g., they have an HRS score of 28.5 or higher) even if such facilities are also subject to the corrective action authorities of Subtitle C of RCRA. The elements of the RCRA/NPL deferral policy are not revised in today's notice.

and (4) converters.⁵ In the June 24, 1988, revision, EPA also recognized that sites where RCRA corrective action may not apply to all contamination are eligible for listing (53 FR 23982).

On August 9, 1988 (53 FR 30002), EPA proposed additional revisions to the policy concerning criteria to determine if an owner or operator is unable to pay for corrective action. No final Agency action has been taken on those proposed revisions.

On August 9, 1988 (53 FR 30005), in a separate Federal Register notice, EPA also further revised a portion of the NPL/RCRA deferral policy relating to the determination of unwillingness. The Agency specified that circumstances under which RCRA sites may be listed on the NPL if an owner/operator's unwillingness to undertake corrective action is established through noncompliance with one or more of the following: (1) A Federal or substantially equivalent state unilateral administrative order requiring corrective action, after the facility owner/operator has exhausted administrative due process rights; (2) a Federal or substantially equivalent State unilateral administrative order requiring corrective action, if the facility owner/operator did not pursue administrative due process rights within the specified time; (3) an initial Federal or State preliminary injunction or other judicial order requiring corrective action; (4) a Federal or State RCRA permit condition requiring corrective action after the facility owner/operator has exhausted administrative due process rights; or (5) a final Federal or State consent decree or administrative order on consent requiring corrective action after the exhaustion of dispute resolution procedures.

EPA also may depart from the above criteria on a case-by-case basis where CERCLA authorities are determined to be more appropriate than RCRA authorities for cleaning up a site. (See, e.g., 56 FR 5602, February 11, 1991).

⁵ Non- or late filers are facilities that were treating, storing or disposing of hazardous waste after November 19, 1980, but did not file a Part A permit by that date and have little or no history of compliance with RCRA. Pre-HSWA permittees are facilities that have permits in place that pre-date the 1984 corrective action requirements of HSWA. The protective filer category includes facilities which have filed Part A permit applications for treatment, storage and disposal of hazardous wastes as a precautionary measure only, and were never actually engaged in hazardous waste management activities subject to RCRA Subtitle C corrective action. Converters are facilities that at one time were treating or storing RCRA Subtitle C hazardous waste but have since converted to generator-only status, or are engaged in no other hazardous waste activity for which interim status is required (53 FR 22982, June 24, 1988).

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Oil pollution, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Authority: 42 U.S.C. 9605; 42 U.S.C. 9620; 33 U.S.C. 1321(C)(2); E.O. 11735, 3 CFR, 1971-1975 Comp., p. 793; E.O. 12580, 3 CFR, 1987 Comp., p. 193.

Dated: March 8, 1995.

Elliott P. Laws,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 95-6673 Filed 3-17-95; 8:45 am]

Selling Code 5600-50-P

40 CFR Part 300

[FRL-5174-2]

National Oil and Hazardous Substances Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of deletion of a site from the national priorities list.

SUMMARY: The Environmental Protection Agency (EPA) announces the deletion of the Kent City Mobile Home Park Site in Kent City, Michigan from the National Priorities List (NPL). The NPL is Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Contingency Plan (NCP) which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), as amended.

EFFECTIVE DATE: March 20, 1995.

FOR FURTHER INFORMATION CONTACT: Betty G. Lavis, Remedial Project Manager (HSE-5J); Waste Management Division; Emergency Response Branch; U.S. Environmental Protection Agency, Region 5; 77 West Jackson Boulevard; Chicago, IL 60604-3590. Phone (312) 886-7183.

SUPPLEMENTARY INFORMATION: The EPA identifies sites which appear to present a significant risk to public health, welfare, or the environment and it maintains the NPL as the list of those sites. Sites on the NPL may be the subject of Hazardous Substance Response Trust Fund (Fund) financed remedial actions. Any site deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action.

Section 300.66(c)(8) of the NCP states that Fund-financed actions may be taken at sites deleted from the NPL.

The site EPA deletes from the NPL is the Kent City Mobile Home Park Site in Kent City, Michigan.

An explanation of the criteria for deleting sites from the NPL was presented in section II of the November 8, 1994, Notice of Intent to Delete FR Doc. No. 94-27647. A description of the site and how it meets the criteria for deletion was presented in Section IV of that notice.

The closing date for comments on the Notice of Intent to Delete was December 7, 1994.

EPA received one comment on the deletion of the Kent City Mobile Home Park Site from the NPL.

Comment: Commenter states they are "concerned by the proposal to abandon a carbon tetrachloride contaminated well" at the site because "groundwater is a valuable resource for present and future generations and that groundwater contamination should therefore be remediated whenever possible."

Response: EPA appreciates the concern and strongly agrees that groundwater is a valuable resource; it is EPA's policy to promote protection of our groundwater resource and to restore usable groundwater to beneficial use whenever possible. However, at the Kent City site, the level of contamination is so low and the area of contamination so localized, that remediation is not practical.

List of Subjects in 40 CFR Part 300

Environmental protection, Hazardous waste.

PART 300—[AMENDED]

40 CFR part 300 is amended as follows:

1. The authority citation for part 300 continues to read as follows.

Authority: 42 U.S.C. 9601-9657; 33 U.S.C. 1321(d); E.O. 11735, 38 FR 21243; E.O. 12580, 52 FR 2923; E.O. 12777, 56 FR 54757.

Appendix B—[AMENDED]

2. Table 1 of Appendix B to part 300 is amended by removing the entry for Kent City Mobile Home Park Site, Kent City, Michigan.

Dated: March 8, 1995.

David A. Ullrich,

Acting Regional Administrator, U.S. EPA, Region V.

[FR Doc. 95-6770 Filed 3-17-95; 8:45 am]

Selling Code 5600-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 265

(SW-FRL-3092-1)

Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is today amending the interim status regulations for closing and providing postclosure care for hazardous waste surface impoundments (40 CFR Part 265, Subpart K), under the Resource Conservation and Recovery Act (RCRA).

The Agency proposed today's modifications to the interim status standards on July 26, 1982. Today's amendments provide conformance between certain interim status requirements for surface impoundments and those requirements contained in the permitting rules of 40 CFR Part 264, that were also published on July 26, 1982. The Agency is also setting forth its interpretation of the regulatory requirements applying to closure of storage facilities regulated under both permits and interim status.

EFFECTIVE DATE: These final regulations become effective on September 15, 1987, which is six months from the date of promulgation, as RCRA section 3010(b) requires.

ADDRESS: The docket for this rulemaking (Docket No. F-87-CCF-FFFFF) is located in Room MLG100, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC and is available for viewing from 9:00 a.m. to 3:30 p.m., Monday through Friday, excluding holidays. Call Mia Zmud at 475-9327 for appointments.

FOR FURTHER INFORMATION CONTACT: RCRA hotline at (800) 424-9348 (in Washington, DC, Call 382-3000) or for technical information contact Ossi Meyn, Office of Solid Waste (WH-565E), U.S. Environmental Protection Agency, Washington, DC 20460, telephone (202) 382-4854.

SUPPLEMENTARY INFORMATION:

I. Authority

These regulations are issued under the authority of sections 1006, 2002(a), 3004 and 3005 of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery

Act (RCRA) of 1976, as amended (42 U.S.C 6905, 6912(a), 6924, and 6925).

II. Background

Subtitle C of RCRA creates a "cradle-to-grave" management system intended to ensure that hazardous waste is safely treated, stored, or disposed. First, Subtitle C requires the Agency to identify hazardous waste. Second, it creates a manifest system designed to track the movement of hazardous waste, and requires hazardous waste generators and transporters to employ appropriate management practices as well as procedures to ensure the effective operation of the manifest system. Third, owners and operators of treatment, storage, and disposal facilities must comply with standards the Agency established under section 3004 of RCRA that "may be necessary to protect human health and the environment." Ultimately, these standards will be implemented exclusively through permits issued to owners and operators by authorized States or the Agency. However, until these permits are issued, existing facilities are controlled under the interim status regulations of 40 CFR Part 265 that were largely promulgated on May 19, 1980. Under RCRA interim status, the owner or operator of a facility may operate without a permit if: (1) It existed on November 19, 1980, (or it existed on the effective date of statutory or regulatory changes under RCRA that render the facility subject to the requirements to have a permit under section 3005); (2) he has complied with the notification requirements of section 3010 of RCRA; (3) he applied for a permit (Part A application) in accordance with section 3005 of RCRA. *Interim status is retained until the regulatory agency makes a formal decision to issue or deny the permit or until the facility loses its interim status by statute for failure to submit Part B permit application and/or certification of compliance with applicable groundwater monitoring and financial assurance requirements.*

In regulations promulgated on July 26, 1982, (40 CFR Part 264, 47 FR 32274), the Agency established permitting standards in 40 CFR Part 264 covering the treatment, storage, and disposal of hazardous wastes in surface impoundments, waste piles, land treatment units, and landfills. Owners and operators of such facilities must meet these standards to receive RCRA permits. Also included in the Federal Register on that date were a series of changes to the interim status requirements of Part 265, which were promulgated to ensure consistency with

the new Part 264 standards. There were, however, a few additional Part 265 conforming changes that the Agency believed should first be proposed for public comment because, in most cases, the public had not had sufficient opportunity to comment on the appropriateness of applying them during the interim status period. Many of the changes that were proposed on July 26, 1982, were promulgated in final regulations on April 23, 1985 (50 FR 16044). Today, the Agency is making final the remaining changes to the surface impoundment closure and post-closure care requirements (§ 265.228) that were proposed on July 26, 1982.

III. Discussion of Today's Amendments

The Part 264 rules issued on July 26, 1982, for surface impoundment closure and post-closure care (§§ 264.228 and 264.310) are in many ways similar to the interim status requirements (§§ 265.228 and 265.310). The Part 264 closure rules, however, contain more specific performance standards to assure adequate protection of human health and the environment. For reasons discussed below, the Agency believes the more explicit Part 264 closure rules should also be implemented during interim status. Moreover, EPA believes that the closure process is adequate to apply these closure requirements. The existing review process for interim status closure and post-closure care plans will provide an opportunity for the Agency to review the specifics of the plans for compliance with the closure performance standards. Thus, any problems with misinterpretation of the closure requirements by the owner or operator would be identified and rectified prior to actual closure. In fact, the review process for closure and post-closure care plans during interim status is similar to the review process of closure and post-closure care plans conducted during the permitting process. Therefore, the Agency believes that these closure requirements are capable of being properly implemented during interim status.

The § 265.228 closure rules proposed on July 26, 1982, and promulgated today, retain the basic format of existing regulations by allowing owners and operators to choose between removing hazardous wastes and waste residues (and terminating responsibility for the unit) or retaining wastes and managing the unit as a landfill. (An additional choice for closure is proposed elsewhere in today's Federal Register.) The requirements for both choices are made more specific in today's amendments.

If the owner or operator chooses not to remove or decontaminate the waste and waste residues, then the rules promulgated today provide that the owner or operator must: (1) Eliminate free liquids by either removing them from the impoundment or solidifying them, (2) stabilize the remaining waste and waste residues to support a final cover, (3) install a final cover to provide long-term minimization of infiltration into the closed impoundment, and (4) perform post-closure care and ground-water monitoring.

The Part 265 regulations promulgated today (like the existing Part 264 regulations for permitted units) allow owners and operators of surface impoundments to remove or decontaminate wastes to avoid capping and post-closure care requirements (§ 265.228(a)(1)). They must remove or decontaminate all wastes, waste residues, contaminated containment system components (e.g., contaminated portions of liners), contaminated subsoils, and structures and equipment contaminated with waste and leachate. All removed residues, subsoils, and equipment must be managed as hazardous waste unless there is compliance with the delisting provisions of § 261.3(d). (Similar Part 265 closure and post-closure care rules for waste piles were promulgated on July 28, 1982.)

The new requirements for closure by removal differ significantly from the previous Part 265 requirements in one respect. The previous interim status requirement in § 265.228(b) required owners or operators to remove all waste residuals and contaminated soil or to demonstrate, using the procedures in § 261.3 (c) and (d), that the materials remaining at any stage of the removal were no longer a hazardous waste. Once an owner or operator made a successful demonstration under § 261.3 (c) and (d), (s)he could discontinue removal and certify closure.

Under § 261.3 (c) and (d), materials contaminated with listed waste (as evidenced by the presence of Appendix VIII constituents) are hazardous waste by definition unless the material is delisted. Materials contaminated with characteristic wastes, however, are only hazardous wastes to the extent that the material itself exhibits a characteristic. Thus to meet the old closure by removal standard, owners or operators of characteristic waste impoundments had only to demonstrate that the remaining material did not exhibit the characteristic that first brought the impoundment under regulatory control.

This demonstration, however, arguably allowed significant and potentially harmful levels of hazardous

constituents (i.e., those contained in Appendix VIII of Part 265) to remain in surface impoundment units without subjecting the units to landfill closure, post-closure care, or monitoring requirements.

For example, the previous version of the rule allowed residues from waste that originally exhibited the characteristic of extraction procedure (EP) toxicity to remain in place at "clean closure" if the residue was no longer EP toxic. This could allow an environmentally significant quantity of hazardous constituents to remain at a facility site that will receive no further monitoring or management. While EP toxic criterion would preclude only a concentration that exceeds 100 times the drinking water standard, constituents may remain at levels significantly above the drinking water standards. If such constituents are close to the saturated zone, they may contaminate ground water at levels exceeding the ground-water protection standard. Furthermore, the waste residues may contain significant and potentially harmful levels of other hazardous constituents (listed in Appendix VIII of Part 261) that are not found through EP testing. Hence, the language "or demonstrate what remains is no longer a hazardous waste" has been dropped from the interim status regulations because it is inconsistent with the overall closure performance standard requiring units to close in a manner that eliminates or minimizes the post-closure escape of Appendix VIII constituents.

Making this conforming change ensures that no Appendix VIII constituent presents any threat to human health and the environment. This is also consistent with several of the new requirements added by the Hazardous and Solid Waste Amendments of 1984. For example, new section 3004(u) of PCRA requires corrective action for releases not only of hazardous wastes, but also hazardous constituents. Similarly, section 3001(f) requires the Agency to consider, when evaluating waste delisting petitions, all hazardous constituents found in the waste, not just those for which the waste was listed as hazardous. Finally, new section 3005(i) requires owners and operators of landfills, surface impoundments, waste piles, or land treatment units that qualify for interim status and receive waste after July 28, 1982, to meet the ground-water monitoring and corrective action standards found in Subpart F to 40 CFR Part 264. These regulations also require owners and operators to monitor and clean up the full range of Appendix VIII constituents found in a waste.

The question has also arisen during the implementation of previous closures by removal whether § 265.228 requires consideration of potential ground-water contamination in addition to soil contamination. The answer to this question is yes. The closure by removal requirements in § 265.228 (a)(1) and (b) require removal or decontamination (i.e., flushing, pumping/treating the aquifer) of "underlying and surrounding contaminated soils." Since contamination of both saturated and unsaturated soils may threaten human health or the environment, the Agency interprets the term "soil" broadly to include both unsaturated soils and soils containing ground water. Thus the closure by removal standard requires consideration of both saturated and unsaturated soils. Uncontaminated ground water is, therefore, a requirement for "clean closure" under Part 265 (and Part 264) as revised today as well as under the previous regulation.

The one comment received on the proposed § 265.228 surface impoundment closure and post-closure care requirements for "clean closure" argued that clay liners should be allowed to remain in place at closure even if they are contaminated because their excavation is expensive and hazardous to workers removing the waste. EPA disagrees. While excavation may be expensive, the additional cost of removing the liner will usually be small in comparison to the cost of removing the waste. Therefore, if an owner or operator is willing to expend the resources to remove the waste, it is not unduly burdensome to go one step further and remove the liner. This burden is justified by the benefit of removing contamination from the impoundment. (See discussion below.) If extensive excavation is needed, thereby considerably increasing the cost of removal, it is generally because extensive contamination of the clay and underlying soils has occurred. In these cases, it may be cheaper to install a proper final cover and perform post-closure care rather than remove the contamination. In addition, we do not believe that removal of the liner will be any more hazardous to workers than is the removal of the waste. With proper safety procedures, removal of the waste and liner should not pose an undue hazard to workers.

EPA's Interpretation of the "Remove or Decontaminate" Standard

The sole commenter on the proposed rule also suggested that, in addition to the case where all wastes, residues, and contaminated liners and soils are

removed, no final cover should be required where the type and quantity of waste in the liner can be shown to pose no public health or environmental threat. This comment touches upon an issue that has arisen in other contexts, that is: What is the necessary extent of removal or decontamination of wastes, waste residues, contaminated liners, and soils (including contaminated ground water) to avoid the landfill closure and post-closure care requirements under both Parts 264 and 265 regulations? The issue concerning how much removal or decontamination of wastes and waste residues is necessary to protect human health and the environment is relevant in a broad range of regulatory contexts currently being examined by the Agency including closure and corrective actions under RCRA and response actions under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) programs.

The removal and decontamination issue arises directly from differences in regulatory strategy between disposal and storage. A storage unit holds wastes temporarily, and the wastes are eventually removed for treatment or disposal elsewhere. The goal at closure is to leave no materials at the storage site that require further care. In contrast, a disposal unit, by definition, is closed with wastes and residues remaining at the site. The goal at closure is to assure that these remaining wastes and residues are managed in a manner that protects human health and the environment. There is no need for post-closure oversight of storage units since all potentially harmful wastes and contaminated materials are removed. This is not true for disposal units; hence, the Agency has promulgated regulations requiring post-closure care for disposal units. (For further discussions on a proposed alternative closure option, see the preamble to proposed §§ 264.310 and 265.310 elsewhere in today's Federal Register).

To assist the reader, we describe below EPA's interpretation of the "remove and decontaminate" language in §§ 264.228 and 265.228, i.e. we describe the amount of removal or decontamination that obviates the need for post-closure care for both interim status and permitted surface impoundment units. With regard to storage units regulated under both Parts 264 and 265, the Agency interprets the terms "remove" and "decontaminate" to mean removal of all wastes and liners, and the removal of leachate and materials contaminated with the waste or leachate (including ground water)

that pose a substantial present or potential threat to human health or the environment. The Agency recognizes that at certain sites limited quantities of hazardous constituents might remain in the subsoil and yet present only insignificant risks to human health and the environment. Because regulations for storage facilities require no further post-closure care, the Agency must be certain that no hazardous constituents remain that could harm human health or the environment (now or in the future). To provide the necessary level of assurance, the Agency will require owners or operators to remove all wastes and contaminated liners and to demonstrate that any hazardous constituents left in the subsoils will not cause unacceptable risks to human health or the environment. The Agency will review site-specific demonstrations submitted by facility owners and operators that document that enough removal and decontamination has occurred so that no further action is necessary. Owners or operators wishing to avail themselves of the site-specific removal option must include in their closure plans specific details of how they expect to make the demonstration, including sampling protocols, schedules, and the exposure level that is intended to be used as a standard for assessing whether removal or decontamination is achieved (see discussion below). The Agency is presently developing a guidance document explaining the technical requirements for achieving a "clean closure". This guidance document should be available in draft form by January 1987. In the meantime, the following discussion presents the framework for the demonstration procedure.

The closure demonstrations submitted by facility owners and operators must document that the contaminants left in the subsoils will not impact any environmental media including ground water, surface water, or the atmosphere in excess of Agency-recommended limits or factors, and that direct contact through dermal exposure, inhalation, or ingestion will not result in a threat to human health or the environment. Agency recommended limits or factors are those that have undergone peer review by the Agency. At the present time these include water quality standards and criteria (Ambient Water Quality Criteria 45 FR 79318, November 28, 1980; 49 FR 131, February 15, 1984; 50 FR 3784, July 29, 1985), health-based limits based on verified reference doses (RfDs) developed by the Agency's Risk Assessment Forum (Verified Reference Doses of USEPA, ECAC, CIN-475,

January 1986) and Carcinogenic Potency Factors (CPF) developed by the Agency's Carcinogen Assessment Group (Table 9-11, Health Assessment Document for Tetrachloroethylene (Perchloroethylene) USEPA, OHEA/600/8-82/005F, July 1985) to be used to determine exposure at a given risk, or site-specific Agency-approved public health advisories issued by the Agency for Toxic Substance and Disease Registry of the Center for Disease Control, Department of Health and Human Services.

The Agency is currently compiling toxicity information on many of the hazardous constituents contained in Appendix VIII to Part 261. The facility owner and operators should check with the Office of Solid Waste, Characterization and Assessment Division, Technical Assessment Branch (202) 382-4761 for the latest toxicity information. However, for some hazardous constituents, formally recommended exposure limits do not yet exist. If no Agency recommended exposure limits exist for a hazardous constituent then the owner or operator must either remove the constituent down to background levels, submit data of sufficient quality for the Agency to determine the environmental and health effects of the constituent, or follow landfill closure and post-closure requirements. Data submitted by the owner or operator on environmental and health effects of a constituent should, when possible, follow the toxicity testing guidelines of 40 CFR Parts 797 and 798 (50 FR 39252, September 27, 1985). The Agency does not believe there are many situations where developing exposure levels will be a realistic option for owners and operators because the testing required by 40 CFR Parts 797 and 798 to produce reliable toxicity estimates is expensive and time-consuming.

The Agency believes it is necessary to present policy on the appropriate point of exposure for the various pathways of exposure in order to provide some national consistency in dealing with the potential impacts of the release of hazardous constituents from closing units. The following point of exposure was chosen because the Agency believes it represents a realistic and at the same time reasonably conservative estimate of where either environmental or human receptors could be exposed to the contaminants released from the unit. For the purpose of making a closure by removal demonstration, the potential point of exposure to hazardous waste constituents is assumed to be directly at or within the unit boundary for all

routes of exposure (surface-water contact, ground-water ingestion, inhalation, and direct contact). Potential exposure at or within the unit boundary must be assumed because no further oversight or monitoring of the unit is required if the unit is closed by removal. (Recall that the land overlying a unit that closes by removal may be transferred and developed freely without giving notice of its prior use.) Therefore, no attenuation of the hazardous waste constituents leaching from the waste residues can be presumed to occur before the constituents reach exposure points.

This approach differs from the existing "delisting procedure" developed in response to the requirements of §§ 261.3 (c) and (d), 260.20, and 260.22. As discussed previously, the "clean closure" approach is based on the premise that, after closure by removal is satisfied, no further management control over the waste (or unit) is necessary. In contrast, delisted solid waste remains subject to the regulatory controls promulgated by the Agency under Subtitle D of RCRA. Subtitle D contains performance criteria for the management of non-hazardous waste. Although the Agency is currently assessing whether more specific Federal regulatory requirements are needed for waste management under Subtitle D, most states have already adopted specific regulatory requirements for Subtitle D waste management. Therefore, even though a waste may be delisted its management continues to be controlled. In contrast, closure by removal will not be followed by any regulatory controls; hence, an environmentally conservative approach is needed to assure no further risk to human health and the environment. Therefore, unlike the current "delisting procedure" that is based on a generic process that only considers the ground-water route of exposure, the demonstration procedure discussed here is waste-specific and site-specific, considers all potential exposure pathways, and assumes no attenuation.

The demonstration should be conservative in the sense that it eliminates the uncertainties associated with contaminant fate and transport, focusing on the waste contaminant levels and contaminant characteristics. Therefore, arguments relying on fate and transport calculations will not be accepted. The Agency is pursuing this relatively conservative approach at this time because we are confident that it will be protective of human health and the environment. After a few years of experience with "clean closure"

demonstrations, the Agency may decide that a less stringent approach is sufficiently reliable to assure that closures based on such analyses are fully protective of human health and the environment. At that time, the Agency may change its position on the use of fate and transport arguments for "clean closure" demonstrations. (Elsewhere in today's Federal Register, the Agency is proposing a third closure option that would incorporate fate and transport factors. However, unlike the closure by removal option, that option would require closure to be followed by verification monitoring to verify the fate and transport predictions and assume that the closure protects human health and the environment.)

To make the demonstration with respect to the direct contact pathway, owners or operators must demonstrate that contaminant levels in soil are less than levels established by the Agency as acceptable for ingestion or dermal contact. Total waste constituent levels in soil should be used for this analysis. Arguments based on exposure control measures such as fencing or capping will not be acceptable since the long-term future use of the property cannot be reliably controlled and hence the long-term effectiveness of these measures is uncertain.

To make the demonstration with respect to the ground-water pathway, owners or operators must remove enough contaminated soil and saturated subsoils (i.e., ground water) to demonstrate that constituent levels in ground water do not exceed Agency-established chronic health levels (based on Rfd or CPF values) and that residual contaminant levels remaining in the soil will not contribute to any future contamination of ground water. (Note: this demonstration may in some cases require constituent-specific ground water data beyond that required by §§ 265.90 through 265.100). The demonstration related to residual soil contamination levels must show that levels of constituents found in leachate from the residual soil contamination are not above Agency-established exposure levels. Levels of constituents in leachate may be estimated based on known characteristics of the waste constituents (e.g., solubility and partitioning coefficients) or determined by the results of actual soil leaching tests. The Agency is exploring the appropriateness of using the extraction procedures (but not the acceptable contaminant levels) found in the Toxicity Characteristics Leaching Procedure (TCLP). Federal Register of January 14, 1985 (51 FR 1690). The current EP Toxicity leaching

procedure is insufficient for this demonstration because it does not capture the organic constituents in the waste.

The analysis of potential air exposures should assess contaminants migrating from the soils into the atmosphere. The demonstration should include emission calculations, available monitoring data, and safe inhalation levels based on Agency-established exposure levels.

The potential surface water exposure analysis should compare Agency-established water quality standards and criteria (45 FR 79318, November 28, 1980) with the levels of constituents that may leach from the residual contaminated soil. Tests described previously should be used to estimate the level of constituents in the leachate. The surface water exposure analysis should also consider existing surface water contaminant concentrations.

IV. State Authority

A. Applicability of Rules in Authorized States

Under section 3008 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, the Agency retains enforcement authority under sections 3008, 7003 and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of the Federal program. The Federal requirements no longer applied in the authorized State, and the Agency could not issue permits for any facilities in a State where the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obligated to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. The Agency is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted

authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

B. Effect on State Authorization

Today's rule promulgates standards that are not effective in authorized States since the requirements are not being imposed pursuant to Hazardous and Solid Waste Amendments of 1984. Thus, the requirements will be applicable only in those States that do not have final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State law.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modification to EPA for approval. The deadline by which the State must modify its program to adopt today's rule is July 1988. These deadlines can be extended in exceptional cases (40 CFR 271.21(e)(3)). Once EPA approves the revision, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those in today's rule. These State requirements have not been assessed against the Federal regulations being promulgated today to determine whether they meet the tests for authorization. Thus, a State is not authorized to carry out these requirements in lieu of the Agency until the State requirements are approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law.

States that submit official applications for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, the State must modify its program by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of those standards must include standards equivalent to these standards in their application. 40 CFR 271.3 sets forth the requirements a State must meet when submitting its final authorization application.

V. Effective Date

Pursuant to section 3010(b) of RCRA, today's amendments will be effective six months after promulgation.

VI. Regulatory Impact

Under Executive Order 12291, the Agency must judge whether a regulation is "major" and, therefore, subject to the requirement of a Regulatory Impact Analysis. As stated in the proposed rule on July 28, 1982, the Agency does not believe these conforming changes will result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or in domestic or export markets. In addition, the Part 265 conforming changes do not impose any requirements beyond those required for permitting facilities under Part 264. Therefore, the Agency believes that today's rule is not a major rule under Executive Order 12291.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

VII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, (5 U.S.C. 601 *et seq.*), the Agency must prepare a regulatory flexibility analysis for all regulations that may have a significant impact on a substantial number of small entities. The Agency conducted such an analysis on the land disposal regulations and published a summary of the results in the Federal Register, Vol. 48, No. 15 on January 21, 1983. Today's conforming regulation does not impose significant additional burdens. In addition, they do not impose any requirements beyond those required for permitting facilities under Part 264.

VIII. Paperwork Reduction Act

The certification requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2050-0008.

List of Subjects in 40 CFR Part 265

Hazardous materials. Packaging and containers. Reporting and recordkeeping requirements. Security measures. Surety bonds. Waste treatment and disposal. Water supply.

Dated: March 8, 1987.

Lee M. Thomas,
Administrator.

For the reasons set out in the preamble, Part 265, Subpart K of Title 40

of the Code of Federal Regulations is amended as follows:

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for Part 265 continues to read as follows:

Authority: Secs. 1008, 2002(a), 3004, and 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925).

2. In 40 CFR Part 265, Subpart K, § 265.228 is revised to read as follows:

§ 265.228 Closure and post-closure care.

(a) At closure, the owner or operator must:

(1) Remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leachate, and manage them as hazardous waste unless § 261.3(d) of this chapter applies; or

(2) Close the impoundment and provide post-closure care for a landfill under Subpart G and § 265.310, including the following:

(i) Eliminate free liquids by removing liquid wastes or solidifying the remaining wastes and waste residues;

(ii) Stabilize remaining wastes to a bearing capacity sufficient to support the final cover; and

(iii) Cover the surface impoundment with a final cover designed and constructed to:

(A) Provide long-term minimization of the migration of liquids through the closed impoundment;

(B) Function with minimum maintenance;

(C) Promote drainage and minimize erosion or abrasion of the cover;

(D) Accommodate settling and subsidence so that the cover's integrity is maintained; and

(E) Have a permeability less than or equal to the permeability of any bottom liner system or natural subsoils present.

(b) In addition to the requirements of Subpart G, and § 265.310, during the post-closure care period, the owner or operator of a surface impoundment in which wastes, waste residues, or contaminated materials remain after closure in accordance with the provisions of paragraph (a)(2) of this section must:

(1) Maintain the integrity and effectiveness of the final cover, including making repairs to the cover as